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No. 513

In the

Supreme Court of the United States

OCTOBER TERM 1968

CORNELIA GREY, JAMES GREY AND MICHAEL GREY,
Petitioners,

v.

FIRST NATIONAL BANK IN DALLAS, ET AL.,
Respondents.

BRIEF OF RESPONDENT FIRST NATIONAL BANK IN DALLAS, SUCCESSOR TRUSTEE OF THE JAMES CHARLES O'CONNOR TRUST, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT FIRST NATIONAL BANK IN DALLAS, SUCCESSOR TRUSTEE OF THE JAMES CHARLES O'CONNOR TRUST, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

Whether the 1960 state court judgment was subject to the kind of attack made upon it by Petitioners; whether the findings of the jury and the District Court were adequately supported by the record and not clearly erroneous; whether the Petitioners established that they suffered any damage.

STATEMENT OF THE CASE

To avoid burdening the Court with unnecessary repetition, we adopt the statements by the other Respondents

and likewise adopt their Briefs to the extent applicable to this Respondent. We do not accept the statement of Petitioners which is highly slanted, rather than objective, and contains much argumentative material. Likewise, we do not accept the Questions Presented given by Petitioners as being the true questions in the case.

We do think it relevant to set forth the jury's findings, which were as follows:

"SPECIAL ISSUE NO. 1

Do you find by a preponderance of the evidence that Philip Kelton did not have authority to represent James C. Grey or Michael C. Grey in the case of First National Bank against Cornelia O'Connor Grey et al., in the 116th Judicial District Court, Dallas County, Texas?

Answer as to each party, 'He was not authorized' or 'He was authorized'.

JAMES C. GREY He was Authorized.

MICHAEL C. GREY He was authorized.

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that the First National Bank in furnishing information to Mrs. Grey, James Grey, and Michael Grey leading to the partition and sale agreement of September 19, 1960, and the judgment of the State Court of November 28, 1960, made any material misrepresentations?

Answer 'yes' or 'no' as to each party.

MRS. GREY NO JAMES C. GREY NO
MICHAEL C. GREY NO

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that the First National Bank in the negotiations with Mrs. Grey, James Grey, and Michael Grey leading to the partition and sale agreement of September 19, 1960 and the judgment of the State Court of November 28, 1960, concealed any material facts?

Answer 'yes' or 'no' as to each party.

MRS. GREY NO JAMES C. GREY NO
MICHAEL C. GREY NO

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that Mrs. Grey, James C. Grey, or Michael C. Grey were damaged by such misrepresentations, if any, or concealments, if any?

Answer 'yes' or 'no' as to each party.

MRS. GREY NO JAMES C. GREY NO
MICHAEL C. GREY NO

* * * * *

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that the First National Bank acted with malice in its actions relating to the partition and sale agreement of September 19, 1960, or in obtaining the Judgment of the State Court of November 28, 1960?

Answer 'yes' or 'no' ANSWER NO

* * * * *

SPECIAL ISSUE NO. 10

Do you find from a preponderance of the evidence that the partition and sale agreement of September 19, 1960, and the Judgment in the State Court were fair

and equitable to Mrs. Grey, James C. and Michael C. Grey?

Answer 'yes' or 'no' as to each party.

MRS. GREY YES JAMES C. GREY YES MICHAEL C. GREY YES

SPECIAL ISSUE NO. 11

Do you find from a preponderance of the evidence that the A'Mell Building had a fair market value in excess of $1,155,000.00 on September 19, 1960?

Answer 'yes' or 'no' ANSWER NO"

* * * * *

SPECIAL ISSUE NO. 13

Do you find from a preponderance of the evidence that the Republic Garage Building property had a fair market value in excess of $650,000.00 on September 19, 1960?

Answer 'yes' or 'no' ANSWER NO

The other issues were conditional and required no answers.

STATUTE INVOLVED

Article 7425(b)-24, Revised Civil Statutes of Texas.

ARGUMENT

1.

This case does not warrant assumption of jurisdiction by the Supreme Court of the United States on certiorari.

This is merely a suit between private parties in which the controverted fact issues were decided against Petitioners

and in favor of Respondents after a full and fair trial. There are no novel or unusual points of law and no supervening questions of public or national importance. There is no conflict with the decision of this Court in *Callen v. Pennsylvania Ry. Co.*, 332 U.S. 725, nor any other cases, the opinion below rather being in accordance with well established law.

2.

Judgment for Respondents was proper herein regardless of any errors claimed by Petitioners because the Motions to Dismiss of Respondents were well taken and the 1960 state court judgment was not subject to the kind of attack made upon it by Petitioners.

The relief sought by Petitioners is barred at the outset by the 1960 judgment of the 116th Judicial District Court of Dallas County, Texas, whose validity they necessarily challenged, asserting it to be void for lack of jurisdiction over James and Michael Grey despite their appearance and answer therein and the express finding of jurisdiction in the judgment.

In general one may not go behind a judgment regular on its face, and the recitals therein must be taken as true in any independent later proceedings. As stated in 34 Tex. Jur. 2d, Judgments, Sec. 325, p. 304, "It is a primary rule in the law of judgments, recognized everywhere, that a judgment of a domestic court of general jurisdiction, rendered in the exercise of its usual powers and regular on

its face, imports absolute verity." Under this rule any defect sought to be asserted in an independent suit must appear on the face of the judgment.

Likewise *Lowman v. Falsetti*, 335 F. 2d 632, states, "The rule in the law of judgments is that a judgment of a domestic court of general jurisdiction, rendered in the exercise of its usual powers, and regular on its face, imports absolute verity."

The federal courts have made some extension of the possible bases of attack by holding that as to a non-resident defendant, the rule of absolute verity cannot be imposed to prevent inquiry into record facts showing lack of jurisdiction. Under this extension the federal court may look not only at the judgment itself but also at the rest of the record in the original case, but it still cannot look behind that record. Thus *O'Boyle v. Bevil*, 259 F. 2d 506, cert. den. 359 U.S. 913, 3 L. Ed. 2d 576, declares:

> "Whatever would be the view of the Texas courts, we think that constitutional requirements of due process require a holding by any court, state or federal, that no such principles of lifting oneself by his own bootstraps can prevent it, in case of a nonresident defendant, from inquiring into *any facts disclosed by the record*. But for the rule of absolute verity we have found that *the record in these two cases discloses* that appellants are denied due process if the judgments are allowed to stand in spite of the procedural defects. Is it any less a denial of due process to hold that a court may by it own fiat declare that requirements were met *which the record discloses* were not in fact met? We think not. * * * It follows, therefore, that as to a nonresident defendant the rule of absolute verity can-

> not be imposed to prevent an inquiry *into the record facts* showing that nonresident service was not legally obtained."

Likewise *Bass v. Hoagland*, 172 F. 2d 205, states:

> "It is also well settled law that its (the judgment's) express recitals import verity. * * * It is equally well settled that such presumptions may be overcome and that recitals as to things proper to be shown in the record on which the judgment rests may be overborne *by reference to that record.*"

Texas cases holding that in an attack upon a judgment lack of jurisdiction can be shown only by the prior record and not by external evidence include *Lewright v. Manning*, 392 S.W. 2d 466 (1965), and *Johnson v. Barnwell Production Co.*, 391 S.W. 2d 776 (1965). Recent cases to that effect from other jurisdictions include *State ex rel. Folds v. Hunt*, 391 S.W. 2d 629 (Tenn., 1965), and *Hambaugh v. Peoples*, 401 P. 2d 776 (1965).

Jurisdiction was questioned by Petitioners only as to James and Michael, and personal jurisdiction over them was not necessary to the validity of the state court judgment. The proceeding in the 116th District Court was brought under Art. 7425(b)-24, Vernon's Annotated Civil Statutes, and it is expressly provided under paragraph C thereof:

> "The only necessary parties to such actions shall be those persons designated by name in the instrument creating the trust, and any persons who may be actually receiving distributions from the trust estate at the time the action is filed; contingent beneficiaries designated as a class shall not be necessary parties."

James and Michael were not designated by name in the will of James Charles O'Connor, which created the O'Connor trust (Plaintiffs Exhibit No. 1, Record Vol. 5, pp. 1-3), nor were they receiving distributions from the trust estate at the time the state court case was filed; moreover they were contingent beneficiaries whose only interests were as the lawful issue of Mrs. Grey who would share in the remainder only if they survived her. *Coker v. Eckert*, 369 S.W. 2d 471, er. ref. n.r.e.; *Guilliams v. Koonsman*, 279 S.W. 2d 579 (S. Ct.); *Tipton v. Tipton*, 12 S.W. 2d 987 (Com. App.); etc.

Even apart from the statute James and Michael were not necessary to the validity of the state court judgment since their interests were virtually represented by their mother, Mrs. Grey. *Miller v. Foster*, 13 S.W. 529 (S. Ct.); *Winston v. Griffith*, 108 S.W. 2d 745; *Knioum v. Slattery*, 239 S.W. 2d 865, er. ref. n.r.e.; *Elly v. Moore*, 11 S.W. 2d 294 (Com. App.); etc.

The claim of fraud was really in connection with the partition and sale agreement rather than the state court judgment itself. Moreover, even if considered in connection with the judgment it is intrinsic rather than extrinsic. It is well settled in Texas, and recognized by the federal cases arising in Texas, that only extrinsic fraud will authorize relief from final judgments. Thus *O'Boyle v. Bevil*, supra, quotes *Alexander v. Hagedorn*, 226 S.W. 2d 996, in which the Supreme Court of Texas so holds. Judge Tuttle's quota-

tion from the *Hagedorn* case includes its quotation from *State v. Wright*, 56 S.W. 2d 950, of this language:

> "'Intrinsic fraud' in the procurement of a judgment is not ground, however, for vacating such judgment in an independent suit brought for that purpose. And within that term is included such matters as fraudulent instruments, perjured testimony, or any matter which was actually presented in and considered by the trial court in rendering the judgment assailed."

The *Wright* case was also cited with approval and substantially quoted by the Supreme Court of Texas in *Crouch v. McGaw*, 138 S.W. 2d 94. See also *Bankston v. Bankston*, 251 S.W. 2d 768; *Garcia v. Ramos*, 208 S.W. 2d 111, er. ref.; *Kelly v. Wright*, 188 S.W. 2d 983 (S. Ct.); *Old Nat. Life Ins. Co. v. Patillo*, 195 S.W. 2d 690, er. ref. n.r.e.; *Johnson v. Barnwell Prod. Co.*, 391 S.W. 2d 776 (1965); etc.

As declared in *Neill v. Neill*, 386 S.W. 2d 642 (1965), neither collateral nor direct attack upon a judgment can be based upon intrinsic fraud.

Likewise this Court in *U. S. v. Throckmorton*, 98 U.S. 61, 25 L. Ed. 93, declared, "The court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed." See also *Dowdy v. Hawfield*, 189 F. 2d 637, cert. den. 342 U.S. 830, 96 L. Ed. 628; *Bradburn v. McIntosh*, 159 F. 2d 925; *Durham v. New Amsterdam Cas. Co.*, 208 F. 2d 342; *Josserand v. Taylord*, 159 F. 2d 249; *Alleghany Corp. v. Kirby*, 218 F.S. 164, aff'd 333 F. 2d 327, cert. dism. 384 U.S. 28, 16 L. Ed. 2d 335; etc.

Fraud as to questions examined and determined in the action or the matter on which the judgment was rendered is necessarily intrinsic. *Caldwell v. Taylor*, 23 P. 2d 758; *Pico v. Cohn*, 25 P. 970; *Clark v. Clark*, 210 P. 93; etc. These cases are cited to such effect in *Hagedorn*, which goes on to say:

> "In fact, the principle is so generally applied that Freeman states in his Law of Judgments (5th Ed.), Vol. 3, p. 2567, that judgments are not impeachable for frauds relating to the merits between the parties; that all mistakes and errors must be corrected from *within* by motion for a new trial, or to reopen the judgment, or by appeal; that the fraud which will otherwise relieve must be in some matter *other than the issue in controversy* in the action." (Emphaisis that of the Supreme Court of Texas).

Further cases so holding include *Corley v. Centennial Construction Co.*, 146 S.E. 2d 609 (1966); *Silitronic Chemical Corp. v. R.K.M. Enterprises*, 197 So. 2d 33 (1967); *Baskin v. Baskin*, 381 S.W. 2d 442 (Ark.); and *Willson v. Burner*, 41 Cal. Rptr. 449 (1964).

The judgment of the 116th District Court expressly found that in its negotiations with Petitioners the Bank made a "full and frank disclosure of all relevant facts known" to the Bank concerning the value of the A'Mell Building or bearing on the fairness of the partition and sale. (R. 129) It likewise expressly found that the partition was fair and equitable to all parties. Testimony was presented to the state court at length, and the transcript of those proceedings was introduced below as DX-127 (R. 870); see also R. 796, 1480, 1767-1768, etc. Thus the issue of whether the Bank

made a full disclosure or not was passed upon in the state court, whether the result there was right or not, so that any fraud in that connection is intrinsic, rather than the issue being withheld from consideration by the state court, which would have been necessary for the fraud to be extrinsic.

O'Boyle v. Bevil, supra, found that the fraud there did consist of "intentional misleading actions that result in the withholding of an issue from the court that, but for such actions, the other party would present to the court," and that the Texas courts recognized such as extrinsic fraud. This is distinguished from fraud in connection with an issue which is presented to the court but merely leads it to decide that issue wrongly. Of course there actually was no material misrepresentation here, as the jury correctly found, but we assume Petitioners' allegations for present purposes, to show that the fraud alleged was not the kind which would have authorized attack upon a final judgment.

Not only the state court judgment here but likewise the record as a whole in that proceeding show jurisdiction, and Petitioners must go outside of not only the judgment but the whole record by purely external evidence to even attempt to show lack of jurisdiction. This the cases do not allow them to do. Even after Petitioners offered proof completely outside the judgment record, the jury and the District Court found against them on the fact issues with respect to both jurisdiction and misrepresentation and justifiably so, but really, under the relevant law, Petitioners were not

entitled to make such an attack upon the state court judgment, so that if there were any errors during the course of the trial they could only be harmless and immaterial.

3.

The findings of the jury and the District Court were adequately supported by the record and not clearly erroneous, and the Court of Appeals correctly so held.

In addition to the recitals in the state court judgment itself, the other parts of the judgment record show that James and Michael appeared and filed an answer and that an attorney took part in the hearing in their behalf. The jury expressly, and the District Court impliedly, found that such attorney was authorized to represent them, and such findings are supported by the law and the evidence.

It is the majority rule that a domestic judgment valid on its face is not subject to collateral attack on the ground that the defendant was not served with process and that the attorney entering his appearance had no authority to do so. Texas cases to this effect include *Watson v. Hopkins*, 27 Tex. 637 (S. Ct.); *Levy v. Roper*, 256 S.W. 251 (S. Ct.); *Letney v. Marshall*, 15 S.W. 586 (S. Ct.); etc. See also *Field v. Gibbs, Pet. C.C.*, 155 Fed. Cas. No. 4766; *Rose v. Parker*, 99 Atl. 817; *Johnson v. Baumhoff*, 18 S.W. 2d 13 (Mo.); etc.

Even as to direct attacks it is presumed that an attorney entering an appearance for a party is duly authorized, and such presumption prevails until it has been conclusively,

or at least clearly and convincingly, proved that the attorney was not so authorized either expressly or impliedly. Thus *Hidalgo County Drainage District No. 1 v. Magnolia Petroleum Co.*, 47 S.W. 2d 875, er. ref., declares, "As in any other case, the presumption of law is that the attorney appearing for a party is duly authorized, and such presumption will prevail until it has been conclusively shown that the attorney was not authorized to appear for the litigant." It is held that "the presumption in favor of authority for appearance is especially strong where it is sought to invalidate a judgment." *Liken v. Shaffer*, 64 F.S. 432. See also *Sloan v. Jepson*, 252 N.W. 535; *Paradise v. Vogtlandische Maschinen-Fabrik*, 99 F. 2d 53; *Burns v. Prudential Ins. Co.*, 294 N.W. 906; *Feldman Inv. Co. v. Connecticut General Life Ins. Co.*, 78 F. 2d 838; *Kynerd v. McCarthy*, 3 F. 2d 32; *Cigler v. Keinath*, 167 Ill. App. 65; etc.

James and Michael both personally signed the agreement, negotiated with James present and participating, requiring the Bank to file a petition in the District Court of Dallas County as quickly as practicable in which they were to be named as parties and would promptly file an answer asking approval and confirmation of the agreement, which judgment was expressly to be entered before December 31, 1960. (R. 106-124) The New York attorney Dorsey was authorized to represent their mother Mrs. Grey and through him Mr. Kelton was authorized to appear for her without question. Michael testified that his mother recommended to him that he file an answer in the proceedings and that

he agreed with her that he would do that. (R. 585) James and Michael had previously been represented by Mr. Dorsey in connection with other trust matters. (R. 518, 1457, 1709, 1715)

Michael testified in his deposition as to his knowledge from his mother that Mr. Dorsey was representing and negotiating for the three of them in Dallas, "Well, I knew he was taking care of our case, so, 'yes, sir,'" and further:

> "Q. Now you have testified that you didn't discuss with your mother that Dorsey was taking care of these Dallas negotiations, but that you assumed it. By that did you mean to infer that you assumed he was taking care of any interests you might have in the property?
>
> "A. Yes, I believed Dorsey was handling the family interests, my brother's and mine and mother's at the same time." (R. 572)"

Later, before signing, Michael inserted the words, "in the sense that my brother and I were my mother's heirs," such addition being suggested by Mr. Alexandroff, one of the attorneys for Petitioners. (R. 573-575) Michael testified that he depended on his mother to see that the contract was carried out. (R. 540-543)

James testified from the witness stand:

> "Q. Now you knew that Mr. Dorsey was available for any information of a legal nature that you needed, didn't you?
>
> "A. Yes." (R. 1736)

He said in his deposition, with reference to Mr. Dorsey, "I thought because he represented my mother he repre-

sented me, because we were all of the same family." (R. 1753-1754)

Dorsey testified that, in connection with partition, he discussed the Bank's suggestions thoroughly with Mrs. Grey, James, and Mike at least 7 or 8 times with all three being present. (R. 1131.) He had previously represented James and Michael in connection with the McLanahan Trust beginning in 1956 and continued to represent them up until February, 1961 (R. 1132-1133), and had represented both Mrs. Grey and the boys in connection with another trust accounting matter (R. 1135-1136) and in connection with an abandonment of land in the 30's or early 40's with respect to the O'Connor Trust (R. 1137-1138); he had advised Mrs. Grey and James about drawing up a trust agreement to give James some independent income (R. 1138); and from 1956 to February 1961, he was the only attorney who represented Mrs. Grey, James or Michael. (R. 1138)

Dorsey further testified that he saw James in connection with the partition and sale three or four times in his office (R. 1146); after the fall of 1959, he saw a great deal of Michael in connection with the partition among other things and discussed the situation with Mrs. Grey, James and Michael all together with conferences in Mrs. Grey's suit at the Sulgrave Hotel (R. 1148); he submitted a written proposal to the Bank for partition of the properties in question, and he had the authority of Mrs. Grey and James and Michael to submit this proposal. (R. 1159)

On the plane returning to New York from Dallas after the partition and sale agreement was drawn up, Dorsey went over it all with Mrs. Grey and then changed seats and went over it with James (R. 1186); he discussed the prospective Texas suit with both Mrs. Grey and James and in the presence of Mrs. Grey and James told the bank officials that any counsel the Bank suggested would be satisfactory to Mrs. Grey and the two boys. (R. 1188-1189) He approved the suggestion of Mr. Kelton as attorney for Mrs. Grey and the two boys and by telephone told Mr. Kelton that he was authorized to represent all of them. (R. 1190) Dorsey expressly advised Mrs. Grey that he had employed Mr. Kelton on her behalf and on behalf of the two boys, doing so in writing. (R. 1192-1196) In the presence of James, Mrs. Grey instructed him to direct all correspondence to her and that she would take it up with the boys. (R. 1198)

Dorsey also testified that he saw James and Michael in Paris in September, 1959, and discussed the partition with them. (R. 1219) His testimony also includes the following:

> "'Q. Did Michael ever specifically state to you that his mother was his agent or that she had authority to represent him in connection with any matter involving the O'Connor Trust?
>
> "A. Yes. He did not specifically say that she was—you used the word "agent" — but whatever his mother wanted, was okay with him.
>
> "Q. When did he state that?
>
> "A. He stated it on previous occasions, on many occasions.

"Q. Before April 25th?

"A. Oh, yes.

"Q. 1960?

"A. Yes.

"Q. Was it earlier than 1959?

"A. It goes back to the handling of the McLanahan Trust. I was their attorney.

"Q. Clear back to 1956?

"A. Yes.'

" 'Q. You have testified previously in response to a question for counsel for the Defendant Bank, that you had authority from James and Michael Grey to submit that proposal, and my question now to you is how did you get that authority?

"A. Because we had many, many conferences from the time the appraisals came in in October of 1959, I believe, until this letter went out on March 21, 1960, as to the different allocations of the property. And, Mrs. Grey, James and Michael were in those conferences.

"Q. Were James and Michael in all the conferences?

"A. They might have been and they might not have been, but they were in a majority of them, by far the majority of them.

"Q. Were there as many as five conferences?

"A. Yes, there certainly were.

"Q. Approximately how many, would you say?

"A. My tally sheet will show you, my previous testimony will show what conferences I had. There were many of them, they were all held at the Sulgrave Hotel.'

"'Q. What was said at any such conference which you and/or your counsel have just described here, or any such meeting, by Michael Grey with respect to your being his attorney and having authority to make such a proposal for him?

"A. We sat down in family conferences, Mrs. Grey, James and Michael and we had interminable conversations with respect to the lease on the Neiman-Marcus building and whether it should be in the Trust of which the boys would be the remaindermen or whether it should be allocated to one of the others; and we all decided, Michael, James and Mrs. Grey, that we wanted to assure the boys with their consent and they wanted it that way, to have an income from the Neiman-Marcus lease of $40,000.00 a year, or $20,000 a year apiece.

"Q. Did Michael Grey ever say to you in any such meeting, 'Will you be my attorney, Mr. Dorsey'?

"A. He certainly said it by implication.

"Q. Did he ever say it specifically?

"A. Yes. I was representing him." (R. 1227-1228)

Mrs. Grey testified that James and Michael left the managing and handling of the properties to her. (R. 1296) She acknowledged that Mr. Dorsey wrote her of the employment of Mr. Kelton to represent her and the boys and that she made no objection. (R. 1329, 1376, 1387-1388) The boys just left things to her. (R. 1389)

Under this testimony, and in view of the strong presumption in favor of the authority of an attorney filing a pleading for a party, especially upon attack of a final judgment, the court and jury were certainly warranted in finding as they did that Mr. Kelton was authorized to act for James

and Michael, as well as Mrs. Grey. Their own testimony to the contrary, as interested parties, was not conclusive or binding upon either the court or the jury. Such authority may be either express or implied and it could well be found that James and Michael, while they were adults, left matters concerning the Trust properties to their mother and that she authorized Mr. Dorsey to represent the three of them and he in turn with her knowledge and consent authorized Mr. Kelton to do so. There is also ample direct testimony from Mr. Dorsey that he was representing James and Michael as well as Mrs. Grey and frequently conferred with them about these matters and had authority from them.

The finding of authority to enter appearance for Michael and James establishes jurisdiction in the state court, so that the other findings are not necessary to the judgment. However, the jury and trial court likewise found that there were no material misrepresentations or concealments and that the partition and sale agreement and the judgment in the state court were fair and equitable. These findings are likewise supported by ample evidence in this voluminous record.

4.

Petitioners were not entitled to relief herein because under the jury verdict, the Court's findings, and the record they suffered no damage.

The jury found from a preponderance of the evidence that there was no damage suffered by any of Petitioners (Special Issue No. 5) and further that the A'Mell Building

did not have a fair market value in excess of the price paid for it by the Bank. (Special Issue No. 11) These findings are amply supported by the record.

An appraisal by Mr. Dunham, a member of the American Institute of Real Estate Appraisers, and Mr. Smitham, a member of the Dallas Real Estate Board and the Texas and National Association, put the fair market value of the A'Mell property at $750,000.00, which the witness Majors considered optimistic (R. 1587-1589), and Majors & Majors had put a price of $650,000.00 on it. (R. 1591) In October, 1959, the Dallas Real Estate Board appraised the A'Mell property at $500,000.00. (R. 1687, 785-786) The jury was clearly warranted in finding that the A'Mell building did not have a fair market value in excess of the $1,155,000.00 paid for it by the Bank, in view of such appraisals in the record. Indeed, there was no evidence at all that it had any greater value. The price paid by the Bank for this property was considerably in excess of its fair market value and the transaction was a highly favorable one for Petitioners, so that they have clearly suffered no damage.

A part of the claim of fraud is that the Bank did not reveal to them that a brokerage commission of $23,750.00 was paid in connection with the purchase of the Republic Garage Building, in addition to the $650,000 purchase price, and further that the acceptance of only 5% interest on a

note of Mr. Majors which provided for 5% before and 10% interest after maturity constituted additional consideration for the Republic Garage Building in the amount of $57,585.00. With respect to the commission, of course there was no representation that there had not been a commission. Mrs. Grey testified that she knew that it was usual and customary for real estate transactions and that their commission was sometimes paid by the purchaser. (R. 1373)

There is no showing in this record, and certainly no conclusive showing, that the failure to charge additional interest on the Majors note after maturity was in any way connected with the purchase of the Republic Garage Building; indeed Robert Stewart, the Bank President, testified that it was the regular custom and practice of the Bank not to charge the additional interest allowable on a note after maturity when the maker has died, and that the Bank never did so. (R. 743-744)

In any case the only claimed relevance of these matters was that Mrs. Grey wanted to get more for the A'Mell Building than the Bank paid for the Republic Garage Building. (R. 1312; etc.) The Bank paid $650,000.00 for the Republic Garage Building. However, even if it be assumed that the brokerage commission and the forgiveness of increased interest on the Majors note be added in, the purchase price of $650,000.00 would only be increased by addition of $23,750.00 and $57,585.00, bringing the total to $731,335.00. This is still far less than the Bank paid for the A'Mell Building.

Petitioners also contended that the Bank misrepresented the purchase price of other buildings by failing to include payments made by the Bank, after it acquired the fee interests and 99-year leases, to obtain cancellation of outstanding shorter leases and for immediate possesion. As a matter of law these payments made after the purchase of the properties by the Bank to obtain cancellation of leases are not part of the purchase price. In any event there is no showing that there was any damage to Petitioners in this respect nor in any other respect.

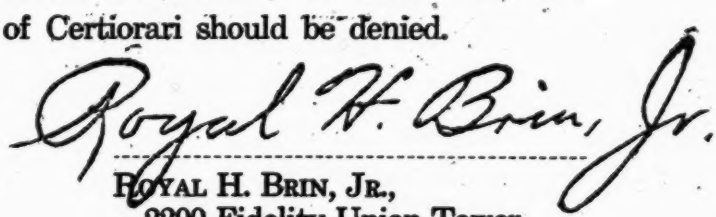
CONCLUSION

This is a case in which the Bank bent over backwards to be completely fair and above board; recognizing the possible conflict of interest when it wished to purchase property belonging to trusts of which it was a trustee, it did not attempt to deal with itself as trustee but rather disclosed the situation to the beneficiaries, offered to resign, and then negotiated with the beneficiaries themselves and their attorney Dorsey rather than attempting to represent the beneficiaries as trustee in the negotiations with itself. The beneficiaries also had the benefit of other independent outside advice. When the beneficiaries had negotiated a deal satisfactory to them and greatly in excess of fair market value, the Bank then presented the matter to a district court of Dallas County in a suit to which the Attorney General of Texas was a party as well as the beneficiaries, in order to have further independent consideration of the fairness and advisability of the transactions.

The Motions to Dismiss were well taken, and Petitioners were not really entitled to the trial they received. However, they did receive a full and fair trial and opportunity to develop the facts, and those facts were decided against them on a record which supports such findings.

The decision of the Court of Appeals here turned upon an evaluation of the particular facts involved and upon construction of a state statute whose constitutionality has not been questioned. There are no matters here of extraordinary national importance nor great constitutional significance such as to call for the exercise of jurisdiction by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, we submit that the Petition for Writ of Certiorari should be denied.



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APPEARANCE AND CERTIFICATE OF SERVICE

I, ROYAL H. BRIN, JR., hereby request the Clerk to enter my appearance as counsel for Respondent, First National Bank in Dallas, as Successor Trustee of the James Charles O'Connor Trust, and as one of the attorneys for said Respondent and a member of the Bar of the Supreme Court of the United States, I hereby CERTIFY that on the 11th day of Oct., A.D. 1968, I served true and correct copies of the foregoing Brief of Respondent First National Bank in Dallas, Successor Trustee of the James Charles O'Connor Trust, by depositing the same in the United States Post Office with First Class Postage Prepaid, addressed to Gerald Meyer, 477 Madison Avenue, New York, New York 10022, Attorney of Record for Petitioners.

Royal H. Brin, Jr.

Royal H. Brin, Jr.